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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 345

NATIONAL HOSPITAL SERVICE SOCIETY, INC., *Petitioner,*

v.

ALBERT F. JORDAN, Superintendent of Insurance, Government of the District of Columbia, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

CORNELIUS H. DOHERTY,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

ALBERT F. JORDAN, Superintendent of Insurance, Government of the District of Columbia, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The petition of National Hospital Service Society, Inc., respectfully shows to this Honorable Court:

STATEMENT OF THE CASE.

It is admitted that the petitioner, National Hospital Service Society, Inc., is a corporation which was incorporated under the fraternal laws of the District of Columbia on the 9th day of August, 1935, under the name of "THE UNIVERSAL HOSPITALIZATION SOCIETY, FRATERNAL

ORDER," under and by virtue of the provisions of Section 749, Sub-Chapter 12, Chapter 18 of the Code of Laws for the District of Columbia, and on the 8th day of May, 1936, the name of the corporation was changed to "NATIONAL HOSPITAL SERVICE SOCIETY INCORPORATED."

In September of 1935, a permit was issued by the Superintendent of Insurance for the District of Columbia to the petitioner to do business as a fraternal organization in accordance with Title 5, Section 146 of the Code of the District of Columbia, complete to March 4, 1929, and a yearly permit issued for the years 1936, 1937, 1938 and 1939.

At the trial of this cause petitioner endeavored to rely upon the actions of prior Superintendents of Insurance, and introduced testimony showing that by virtue of the acts of the prior Superintendents of Insurance the Society became indebted in the sum of approximately $39,000.00 for money and services advanced to the Society to take care of outstanding claims of the society and to place it on a firm financial basis.

In the agreed statement of facts, commencing on Page 9 of the Record, the Court refused to receive testimony covering the action of a prior Superintendent of Insurance covering his idea of the Statute and what he had informed Mr. Stover at the time he took over the organization, and upon which representations he and his family put $39,000.00 in cash and services, and the Court stated that petitioner could tender proof, but that it would be excluded, and the petitioner tendered, in substance, the following facts (R. 10-18):

William H. M. Stover testified on behalf of the petitioner, on direct examination, that he was the Secretary and Treasurer of the National Hospital Service Society, Inc., and had first joined the Society on March 8, 1938; that at the time the witness took over the control of the Society it was in a very bad financial condition, but the condition of the Society, insofar as it referred to the ini-

tiation of members, medical examinations, death benefits, lodge and ritualistic work, was practically the same in March of 1938, as it was on the 20th day of May, 1940, when the bill of complaint was filed, and the petitioner had obtained yearly permits to do business as a fraternal organization in the District of Columbia for the years 1935 through April 30, 1940, inclusive; the agreed statement of facts further contains the statement that all throughout the tenure of J. B. Moor as Superintendent of Insurance, which terminated with his death in July of 1939, J. B. Moor approved the status of the Society and issued to it yearly permits, and Albert F. Jordan, the respondent, issued a yearly permit in 1939, after the death of J. B. Moor, for the reason that he felt it would be a little arbitrary for him to refuse when he was convinced that the failure to make application for the license in the early part of the year was inadvertent, and since his predecessor had issued the license in previous years, he felt that J. B. Moor would have issued it at that time, so that rather than be arbitrary about it, he stated he would issue it with the statement that they must show him that they were fraternal before he would renew it.

The witness further stated that, relying on the fact that it was a going concern with a permit, he and members of his family advanced the Society in money and wages approximately $39,000.00, and during that period of time neither he nor any other officer or director received a dime for the services rendered, but that he and his brother received only credit for their services in reckoning this $39,000.00 obligation; that a new certificate was issued after the witness became manager of petitioner and that the better part of this contract was written by the then Superintendent of Insurance, and at the time that the Superintendent helped with the policy he stated that he was not officially permitted to do this thing but that he was trying to help W. H. M. Stover straighten up something that he thought was largely his (J. B. Moor) fault.

That J. B. Moor, the then Superintendent of Insurance, practically supervised the acts of the petitioner while he was the Superintendent of Insurance and wrote a letter, which appears in the statement of evidence, covering the agency contract with the Society (R. 12).

The witness further stated that he was advised to take over the operation of the Society by Mr. Moor and that when he joined the Society it was absolutely in hopeless insolvency, and there was about $300.00 in the cash till and ten or twelve hundred dollars of claims disclosed, and that subsequently it developed that there was about $15,000.00 of claims unpaid, including a very bad reputation throughout the city, and also that the Superintendent of Insurance had knowledge concerning these outstanding claims against the Society, but which he did not disclose to the witness, and the witness identified a slip of scrap paper in the handwriting of J. B. Moor, which showed only claims pending in the sum of $700.00, and that $3,500.00 would be ample to put the institution on a sound financial basis, and that this memo was written about two days before March 8, 1938, when the witness took over, and thereafter advanced $5,000.00; that when he first started checking into the claims against the Society it looked as if the Society owed but $10,000.00 in claims and then it looked like $15,000.00 and then it finally amounted to $25,000.00, although it had only been represented to be approximately $700.00, and that the Society liquidated every just obligation, and the statement of facts contained a letter from J. B. Moor, then Superintendent of Insurance, under date of March 4, 1938, addressed to the Honorable W. S. Hanna, Commissioner of Insurance, at Baltimore, Maryland, in which the Superintendent of Insurance, in effect, states that the Society complied with the fraternal laws of the District of Columbia. (R. 15-17).

That the Society relied upon the acts and the statements of the Superintendent of Insurance and it was not until all the outstanding obligations against the Society were ac-

tually taken care of, and the Society placed on a basis of "pay as you go," that it was refused a permit to do business in the District of Columbia and threatened with prosecution for doing business without having a permit to do so, even though there was no difference in the set-up of the Society between March of 1938 and May of 1940, other than the fact that they were having lodge meetings, and that the Society's financial condition had been greatly improved for the past eighteen months.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the United States Court of Appeals for the District of Columbia is on a question of general importance and is in conflict with its previous decisions and affects property rights.

2. The decision of the United States Court of Appeals for the District of Columbia presents a question relating to the construction of a Statute of the United States.

3. The decisions of the United States Court of Appeals for the District of Columbia do not give proper effect to the applicable decisions of this Court.

4. The decision of the United States Court of Appeals for the District of Columbia is in conflict with the decisions of other United States Circuit Courts of Appeals.

QUESTIONS PRESENTED.

1. Whether the United States Court of Appeals for the District of Columbia was in error in affirming the judgment of the District Court of the United States for the District of Columbia, in excluding the proffered testimony covering the acts of the prior Superintendents of Insurance.

2. Whether the United States Court of Appeals for the District of Columbia was in error in holding that the respondent, and also the District of Columbia, was not estopped by the actions of prior Superintendents of In-

surance, upon which your petitioner relied and incurred obligations.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8018, NATIONAL HOSPITAL SERVICE SOCIETY, INC., Appellant, vs. ALBERT F. JORDAN, SUPERINTENDENT OF INSURANCE, GOVERNMENT OF THE DISTRICT OF COLUMBIA, Appellee, and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

NATIONAL HOSPITAL SERVICE SOCIETY, INC.

By CORNELIUS H. DOHERTY,
1010 Vermont Avenue, N. W.,
Washington, D. C.
Counsel for Petitioner.

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ALBERT F. JORDAN, Superintendent of Insurance, Government of the District of Columbia, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I

THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 29) is reported in 128 Fed. (2nd) 460.

II

JURISDICTION.

1. The opinion of the United States Court of Appeals for the District of Columbia is dated May 28, 1942 (R. 29).

2. The United States Court of Appeals for the District of Columbia, in sustaining the judgment of the District

Court of the United States for the District of Columbia, held that the respondent, Albert F. Jordan, as Superintendent of Insurance of the Government of the District of Columbia, was not estopped by the acts of the prior Superintendents of Insurance.

3. The United States Court of Appeals for the District of Columbia, by its ruling, ignored its own decisions and applicable decisions of this Court in holding that the respondent was not subject to the ordinary rules governing estoppel.

4. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III

STATEMENT OF THE CASE.

A full statement of the case has been given under the heading "STATEMENT OF THE CASE" in the Petition, and, in the interest of brevity, the statement is not to be repeated at this point.

IV

SPECIFICATION OF ERRORS.

1. The United States Court of Appeals for the District of Columbia erred in holding that the respondent was not estopped by the acts of the prior Superintendents of Insurance.

2. The United States Court of Appeals for the District of Columbia erred in holding that your petitioner was not entitled to have the acts of prior Superintendents of Insurance considered as a part of the evidence in an injunction proceeding.

3. The United States Court of Appeals for the District of Columbia erred in sustaining the action of the District Court of the United States for the District of Columbia in its refusal to consider the acts of prior Superintendents of Insurance.

V

ARGUMENT.

The United States Court of Appeals for the District of Columbia Erred in Holding That the Respondent Was Not Estopped by the Acts of the Prior Superintendents of Insurance.

The record in this case discloses that the only matter which was presented to the United States Court of Appeals for the District of Columbia was the exclusion of certain testimony covering acts of prior Superintendents of Insurance, which your petitioner considered was vital to its case, and, in reliance upon which acts, your petitioner had become indebted in approximately the sum of $39,000.00.

The petitioner received a permit under Title 5, Section 146 of the Code of Laws for the District of Columbia, complete to March, 1929, being the Act of March 3, 1901, Stat. 1312 (c) 854, Section 754, which is as follows:

> "Permit from superintendent of insurance.—The said superintendent shall, upon the application of any association having the right to do business within said District, as provided by sections 141 to 157 of this title, issue to such association a permit in writing authorizing such association to do business within said District, for which certificate and all proceedings in connection therewith such association shall pay the said superintendent the fee of five dollars."

This Act of Congress gives to the Superintendent of Insurance the right to issue a permit to such an association, and it is not limited to one year, but apparently the Superintendent of Insurance has been collecting a yearly license under this Section of $5.00 a year, to which it is not entitled, but the permit which was granted to the petitioner in 1935 by this Section would be an unlimited permit subject to Section 154 of Title 5, being the Act of March 3, 1901, 31 Stat. 1315 (c) 854, Section 762, which says that

where any association fails to comply with the provisions of this Chapter the Superintendent of Insurance shall give notice to the attorney for said district, who shall immediately commence action against such association to enjoin the same from carrying on any business.

Under date of March 24, 1938, J. Balch Moor, the then Superintendent of Insurance, addressed a letter to W. S. Hanna, Commissioner of Insurance, Baltimore, Maryland (R. 15-17), which clearly indicates that Mr. Moor was satisfied with its fraternal status, and was bearing in mind the fact that the appellan tSociety had gone through a very strenuous financial siege, and that it was entitled to certain considerations and further that he felt that they complied with the fraternal laws of the District of Columbia, and it is agreed (R. 10) that there was no difference in the set-up of the Society in March of 1938, and that of May 20, 1940, when the bill of complaint was filed in this case.

So long as the status of the petitioner remains the same as when the permit was granted to it to act as a fraternal organization by one Superintendent of Insurance and acquiesced in by subsequent Superintendent of Insurance, and no fraud is shown on its part, and it makes the reports required under the Code, there is a contractual relationship between the Department of Insurance and the petitioner, and the Court should have considered this evidence in ascertaining whether or not the petitioner was entitled to continue to do business in the District of Columbia as a fraternal organization.

The United States Court of Appeals for the District of Columbia Erred in Holding That Your Petitioner Was Not Entitled to Have the Acts of Prior Superintendents of Insurance Considered as a Part of the Evidence in an Injunction Proceeding.

It is the contention of the petitioner that the respondent is estopped to refuse to permit the petitioner to continue as a fraternal organization in the District of Columbia, so

long as it is not guilty of some fraud or failure to report in accordance with Title 5, Section 154 of the Code of Laws for the District of Columbia, complete to March, 1929.

In the case of *District of Columbia* v. *Cahill,* 60 Apps. D. C., 342, 54 Fed. (2nd) 453, that Court said, in affirming the decision of the Trial Court, which had granted a decree permanently enjoining the District of Columbia from canceling or revoking a certain certificate issued to appellee by the Inspector of Buildings of the District of Columbia permitting the use and occupancy as a garage of the building known as 1615 O St., N. W.:

> "It follows from these facts and circumstances that the District of Columbia is estopped from revoking the certificates of occupancy for garage purposes here in question. The District is acting in this matter as a municipal corporation in relation to strictly corporate affairs, and, where the essential elements of an estoppel are present, it may be estopped by its acts and conduct in like manner and under similar circumstances as in the case of estoppels against individuals. 21 C. J. 1189.
>
> 'It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped, or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvement that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied.' (People v. Rock Island, 215 Ill. 488-495, 74 N. E. 437, 440, 106 Am. St. Rep. 179.)
>
> 'But although the courts of Illinois do not permit rights to be acquired in city streets and public places by mere adverse possession, yet they have frequently held that the doctrine of estoppel in pais is applicable to municipal corporations, and that they will be estopped or not as justice and right may require; that there may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud,

as where a party acting in good faith under affirmative acts of the city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired. Under such circumstances the doctrine of equitable estoppel will be applied. The court does not consider that there is either danger to the public or injustice in the application of the doctrine of estoppel under such circumstances. In the exercise of proper diligence the public authorities may prevent encroachments upon public streets, and if they do not, any citizen may take the necessary steps to do so; and if there is not only a failure to act by either, but affirmative action with the apparent approval of every one interested, and the situation is changed by permanent improvements being made, the principles of equity require that the public should be estopped.' Dillon (5th Ed.) vol. 3, par. 1191. See Hagerstown v. R. Co., 123 Md. 183, 196, 91 A. 170, Ann. Cas. 1916B, 1267, 7 A. L. R. 1239.

In our opinion, the instant case is one where, under all the circumstances to assert a supposed public right would be to encourage and promote a wrong, whereby a party acting in good faith under affirmative acts of a municipal corporation, and making expensive and permanent improvements in reliance thereon, would unjustly and inequitably be deprived of the rights which the corporation had granted to him."

Clearly this is a case where the petitioner, acting in good faith, has obligated itself in the sum of $39,000.00 by reason of the acts of the Superintendent of Insurance, and it would be inequitable and unjust at this time to refuse to allow the appellant to continue in business.

In the case of *State ex rel. Caldwell* v. *Lincoln Street Railway,* 80 Neb. 333, 114 N. W. 422, a case in which the street railway had apparently obtained a charter and ordinance, voted upon by the electors, giving it the right to use any street it desired, proceedings were instituted to oust it from the use of the street, and the Court held that by the constitution such a grant is greater than the power vested in the legislature and clearly invalid, and the Court went on to say as follows:

"As to the constructed lines, it would be manifestly unjust, not only to the defendant but to the holders of its securities, to now oust it of rights and privileges which it, and those through whom it takes title, have been claiming and exercising for years with knowlege and acquiescence on the part of the State. The State, like individuals, may be estopped by its act, conduct, silence and acquiescence. In State vs. School District, 85 Minn. 230, 88 N. W. 753, it is said:

'In cases where the right of a corporation to assert its corporate existence has been questioned because of some defect or irregularity in the proceedings for organization, it has frequently been held that the doctrine of estoppel is applicable where there have been acts on the part of the State which in terms amount to a waiver. The conduct of a State may be such as to constitute a declaration that a forfeiture of corporate rights will not be insisted upon and that the right to declare such forfeiture is waived. The authority upon this is abundant.'"

In the case of *State ex rel Washington Paving Company* v. *Clausen State Auditor et al.*, 90 Wash. 450, 156 Pac. 554, where a contractor was fraudulently concealing a secret price which gave him an advantage over other bidders, and which became known to the Board of County Commissioners and also the State Highway Commissioners, but who overlooked this fraud and permitted the contractor to continue and finish the work, and then refused to pay on the ground of fraud in the original bid, the Court said:

"This is not a case of estoppel claimed by mere inaction of public officers. It is a case of their acting. Daily did those officials not only permit the delivery of labor and materials on the public property but see to it that it was laid to suit them. * * *

As in Ettor vs. Tacoma, supra, we are of the opinion that the state is estopped. But shall the contractor be relegated to quantum meruit or enjoy the contract itself? We sustain him in the latter. * * *"

In the instant case the prior Superintendents of Insurance had knowledge of everything that was going on, and,

in fact, urged the action of the petitioner, and it appears that the respondent, who was connected with the office of the Superintendent of Insurance since September 21, 1937 (R. 17) had some knowledge of what was going on concerning the petitioner.

In the case of *Essex* v. *New England Telegraph Company,* 239 U. S. 313, 60 L. Ed. 301, 36, Sup. Ct. Rep. 102, where a town had given written permission to a telegraph Company specifying how posts could be placed and wires run, and the Company has complied with such permission, and the town desired to revoke this permission, the Court said at Page 321:

> "Under all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The Company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment * * *; and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation under exceptional circumstances may be held to have waived its rights or to have estopped itself. * * *"

In the case of *City Railway Company* v. *Citizens Railroad Company,* 166 U. S. 557, the Court at Page 566 said:

> "All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the Company incurred a new liability; as, for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. * * *"

In the case of *County of Randolph* v. *Post,* 93 U. S. 502, the Court, at Page 513, said:

> "We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract. * * *"

It is evident from the above cited cases, including the case of the District of Columbia v. Cahill, that municipal corporations and their agents are estopped by the acts of their agents where it appears that the corporation has any authority to do the acts upon which the estoppel is based, and in this case it clearly appears that the acts of the prior Superintendents of Insurance who had issued the permits, and upon whose acts your petitioner became indebted to certain individuals, were in accordance with the authority then vested in those individuals, and it is unlike a case where the official had no authority under any circumstances to do the act relied upon.

The Ruling of the United States Court of Appeals for the District of Columbia Is In Conflict With the Applicable Decisions of Other United States Circuit Courts of Appeals.

The United States Court of Appeals for the District of Columbia, in its opinion, referred to the case of *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209, 55 S. Ct., 674, said:

> "The petitioner who was chargeable with knowledge of the prohibition of the Statute may not invoke an estoppel to impose a liability which the Statute forbids."

and there was no evidence upon which to sustain such an application of this case, for under the Statute set out above, governing the permits to be issued to fraternal organiza-

tions, it was left to the Superintendent of Insurance to ascertain whether or not the organization had complied with the fraternal laws of the District of Columbia, and he did have the authority to issue such a permit, even though he was in error in his view of the required facts; whereas, in the Awotin case referred to above, there was a direct prohibition by the Statute of the act complained of.

In the case of *Scott County, Ark.* v. *Advance-Rumley Thresher Co.,* 280 Fed. 739, the Court said at Page 748:

> "If the contract was one beyond the power of a county in any circumstances to make, then the keeping and using of the machinery would not constitute an estoppel, and the act of the County under such circumstances could not be ratified. The law is laid down by Dillon on Municipal Corporations, Section 797, as follows: 'A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers but not otherwise. * * *' "

In the case of *Mayor and City Council of Baltimore* v. *Crown Cork & Seal Co., Inc., et al.,* 122 Fed. 2nd, 385, where the city harbor engineer, under the city's chief engineer's orders, prepared plans fixing division line in waters of river between areas wherein the city and corporation, owning lands fronting on the river, were entitled to exercise their respective riparian rights, and upon the basis of which the corporation expended large sums of money, the Court said, at page 390:

> "This conclusion compels the further holding under the Maryland decisions that the City will not now be heard to say that it has not fixed the boundary lines between its property and that of the Chemical Company in the waters of the river, in that the Hammond plan was not authorized or ratified by ordinance of the Mayor and City Council. The evidence shows that the plan was prepared by the Harbor Engineer under the orders of the Chief Engineer, and that the airport was actually constructed with its southern bulkhead

erected upon the Hammond line. Moreover, the Chemical Company was forbidden to erect improvements in the river in accordance with the deed line, and has actually made improvements under permits from the City in the area from which the City now desires to exclude it. In short, the City is now insisting upon a line which under the Hammond plan it rejected.

These facts are sufficient to create an estoppel, which, under the Maryland decisions, the City cannot avoid by the plea that it did not exercise the powers conferred upon it in the proper fashion. In Rose v. Mayor and City Council of Baltimore, 51 Md. 256, 34 Am. Rep. 307, the validity of the purchaser's title to a market stall sold by the City was questioned because of the failure of the City to authorize the sale by ordinance. The suit was brought on notes given by the purchaser in part payment. The Court said (51 Md. at pages 271, 272):

'But it is certainly true that there should be, in all cases, a previous ordinance directing the sales; as by the terms of the power it is contemplated that the judgment and discretion of the Mayor and City Council should be exercised, as to the manner of making the sales, and the term for which the stalls should be sold. However, in a case like the present, where the act done is strictly within the powers of the corporation, and could have been authorized to be done in the manner it has actually been done, but the corporation has failed to comply with some formality or regulation which it should not have neglected, but which has in fact been omitted; in such case, after both parties to the transaction have acted and proceeded as if all preliminary formalities and regulations had been complied with, and rights have attached, the corporation itself could not be heard in a Court of justice to set up, with a view of defeating the rights of the other party with whom it has dealt, that it had neglected to observe some formality or regulation that regularly it should have observed before entering into the transaction in question. This principle of estoppel is applicable to corporations generally; * * * and it is equally applicable to a municipal corporation as to any other.'

Again in Hagerstown v. Hagerstown Ry. Co., 123 Md. 183, 91 A. 170, 7 A. L. R. 1239, Ann. Cas. 1916B, 1267, the City sought to enjoin the Railway Company

from furnishing electric light and power to citizens, because the consent of the City to the exercise of the franchise had not been given by ordinance. The court held that the City was precluded from taking this position, because it had the power to grant the franchise and the Company had exercised the right by building a plant and operating appliances upon the streets, with the knowledge and consent of the proper municipal authorities. These decisions represent the Maryland law today on the point rather than the earlier cases to which the City refers, such as Baltimore v. Eschbach, 18 Md. 276; Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; State v. Kirkley, 29 Md. 85; Baltimore v. Musgrave, 48 Md. 272, 30 Am. Rep. 458.

We think, moreover, that the City is estopped in this case to repudiate the Hammond line, even if it did not possess the power to establish divisional lines in the waters of the river. The City was a property owner, and as such, had the undoubted power to make an agreement binding upon it and its next door neighboor, as to the division of riparian rights between them. The Hammond line may deprive the City or the Chemical Company of some part of the area to which it might be entitled under some other apportionment, but the settlement of that line between them need not affect the divisional lines between the other properties in the area. Consequently, the rights of the City as a property owner were affected by acts of its representatives, sufficient to give rise to an estoppel, even though the City in its governmental capacity had no power to establish divisional lines throughout the entire area."

In *Hackett* v. *Ottawa*, 99 U. S., 86, the Court, at page 96, said:

> "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

In the case of *Green County* v. *Tennessee Eastern Electric Co.*, 40 Fed. (2nd) 184, the Tennessee Eastern Electric

Co. did certain work at the request of the County and which was subsequently attacked by the County as ultra-vires and unconstitutional and that the contract was void, and the Court stated at page 186:

> "After the Electric Co. had acted upon this resolution the County could not repudiate it and claim damages for the doing of the thing that it had authorized and induced the Electric Co. to do. The doctrine of estoppel may be invoked against the County as well as an individual. * * *"

In *Quarles* v. *City of Appleton,* 299 Fed. 508, the Court stated at page 516:

> "Estoppel is not limited to instances where the city has entered into an express contract which it would be unconscionable for it to repudiate. In fact, estoppel may arise where no contractual relations (express or implied) are involved, as is illustrated in cases involving street boundaries and individuals' improvements. In fact, there is no good reason why (the necessary facts appearing) a municipality should not be prevented from denying a position, relied upon by an adversary, which it has previously asserted. The doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it. No better statement of this rule can be found than that appearing in Eau Claire Dell's Improvement Co. v. Eau Claire, 172 Wis. 240, 179 N. W. 2, where the court said:
>
> 'It is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons.'
>
> The same rule is announced in Wykes v. Water Co. (C. C.) 184 Fed. 752, where the Court said:
>
> 'That a municipal corporation, equally with a private one, may be estopped from denying the validity of its contract made within the general scope of its powers, although not entered into or carried out in the precise

or formal manner required by law, is well established; and especially is this true with reference to a contract relating to its proprietary, as distinguished from its governmental, functions.'"

In *City of Los Angeles* v. *Borax Consolidated, Limited, et al.*, 102 Fed. (2nd) 52, a case in which the City of Los Angeles admitted that it recognized the principle of estoppel, insofar as it referred to municipalities, but contended that the rule was not applicable to tidelands, for the reason that the City of Los Angeles had no power to make a grant of tidelands, and, consequently, it could not do indirectly what it could not do directly, and the Court, at page 58, stated as follows:

> "We conclude that the City of Los Angeles, owner of the tide lands in the Inner Bay of San Pedro, by virtue of the conveyance to it from the State of California by statutory grant in 1911, had the power and authority to determine the boundary lines of such tide lands by agreement with the upland owners. We hold that the acts and conduct of the city and its officials in charge of the harbor improvements in dealing with the lands claimed by the appellees whereby the appellees had been induced to invest approximately a million and a half dollars, present an exceptional case for the application of the doctrine of estoppel in pais, one clearly within the principle of the decisions of the California Supreme Court in City of Los Angeles v. Cohn, supra, McGee v. City of Los Angeles, supra, and Times-Mirror Co. v. Superior Court, supra, and that the city is therefore estopped from denying that the boundary lines thus recognized by it are not in fact the boundary lines of the uplands claimed by the appellees."

In *County of Parkersburg* v. *Baltimore and Ohio R. R. Co.*, 296 Fed., 74, the Court said, at page 81:

> "When an act is within the general scope of a municipal power and is not expressly forbidden by law, the conduct of its officers may be attributed to a municipality as laches or estoppel, according to the circumstances. * * *"

In the case of *United States* v. *Denver and R. G. W. R. Co. et al.*, 16 Fed. (2nd), 374, the Court said at page 376:

> "The equitable claims of the State or of the United States are no stronger than those of an individual under like circumstances, and a State or the United States may waive a claim under circumstances that would estop an individual from the assertion of a similar claim. * * *"

The foregoing decisions of the various Circuit Courts of Appeals and of this Court definitely hold that where the municipality has any vestige of authority, through its officers, to do the acts upon which other persons or parties have relied and that they have expended moneys or otherwise acted to their detriment, that the municipality would be estopped the same as an individual. It appears from the facts in the instant case that prior Superintendents of Insurance for the District of Columbia gave permits to your petitioner and, by various other overt acts, held your petitioner out as a fraternal organization, and, in reliance upon these various acts, your petitioner has become indebted in the sum of approximately $39,000.00, and there is nothing in the record to indicate that any fraud or injury will be sustained by any individuals, and, under the circumstances, the United States Court of Appeals for the District of Columbia, should have followed the decision of its own Court in the case of the *District of Columbia* v. *Cahill*, and the decisions of the various Circuit Courts of Appeals above set forth.

There is nothing in the record to sustain the statement contained in the opinion of the Court of Appeals for the District of Columbia that:

> "It would be exceedingly prejudicial to the public interest to permit appellant to carry on an insurance business without the safeguard which the Statute requires."

for it had been doing this business for some time in the past and, if it was apparent that there was any injury to individuals by reason of the continuance of your petitioner in business, then the Statute under which it was incorporated gives to the Superintendent of Insurance the right to come into the District Court of the United States for the District of Columbia and ask that an injunction be issued against your petitioner.

CONCLUSION.

It is respectfully submitted that the United States Court of Appeals for the District of Columbia erred in not holding that the respondent, Albert F. Jordan, Superintendent of Insurance, was estopped by the acts of prior Superintendents of Insurance, and that it has failed to give proper effect to the applicable decisions of its own Court, of this Court, and of the various United States Circuit Courts of Appeals, and which are set forth in this petition, and that this case is one calling for the exercise by this Court of its supervisory powers, in order that your petitioner may receive a fair and impartial decision and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

CORNELIUS H. DOHERTY,
Counsel for Petitioner.

(13)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 345

NATIONAL HOSPITAL SERVICE SOCIETY, INC.,
Petitioner,

v.

ALBERT F. JORDAN, SUPERINTENDENT OF INSURANCE, GOVERNMENT OF THE DISTRICT OF COLUMBIA,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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COUNTER STATEMENT OF CASE

At the conclusion of the trial below, the trial justice entered findings of fact, none of which is challenged by petitioner. These findings (R. pp. 23-26) are in substance as follows:

That, as of the date this suit was filed, four of the five directors of petitioner corporation were members of the Stover family; that each applicant for membership in the petitioner corporation was required to assign, by a proxy agreement, his rights to participate in the government of the petitioner corporation to a designated official of that corporation; that W. H. M. Stover had entered into an agreement with that

corporation to serve as general manager, by the terms of which agreement "he was granted full and exclusive control and custody over all the affairs and funds of the said Society"; that it was also provided in that agreement that "so long as he shall be retained as general manager he shall receive as compensation for his services rendered in this capacity 35% of all insurance dues which may be paid in in the said Society;" that applicants over the age of fifty-five years were accepted for membership as of the time of filing suit; that only insurance beneficial memberships were available; that provision for payment of death benefits was qualified by a restriction to the effect that payment thereof would be made only when in the opinion of the Board of Directors such payment would not reduce the reserves of petitioner corporation beyond a safe margin; that petitioner corporation did not require medical examinations of applicants for life benefits but simply retained the right to such an examination; that certain advertisements placed in local newspapers and distributed by means of cards thrown in doorways advertised the sale of noncancellable insurance; that all of petitioner's policies are cancellable during the first five years of the policy; that the only initiation prescribed by the petitioner is the filling out of an application by an applicant and the tendering of the application with his initiation fee and one monthly premium; that, when the application has been accepted by the petitioner corporation, the officers of the petitioner corporation consider the member has been initiated; that the ritual was reported lost or misplaced as of March 28, 1940; that there was no record of or any reference to or consideration of the ritual between the time W. H. M. Stover first became associated with petitioner corporation on March 8, 1938, until March 28, 1940, and that no restrictions exist in petitioner corporation as to race, creed or color.

The trial Court found as a matter of law (R. pp. 26, 27) that the Superintendent of Insurance for the District of Columbia (respondent here) was not estopped by reason of the actions

of prior Superintendents of Insurance to deny petitioner corporation a license; that the burden is upon the petitioner, seeking to compel the issuance of the license, to show that it was entitled to a license under the law; that petitioner association was not carried on for the sole benefit of its members and their beneficiaries; that petitioner corporation has failed to show that it is not operated for profit; that petitioner has no real lodge system or ritualistic form of existence and the system it had was merely a pretext; that petitioner has no representative form of government; that petitioner has no real binding provisions for the payment of benefits in the case of death; that applications for beneficial membership were accepted from persons whose age exceeded fifty-five years, and that no real medical examination is required of applicants for life benefits.

None of the conclusions of law of the trial Court was challenged by petitioner in the Court of Appeals except the first, which is, in substance, that the respondent is now estopped by reason of the actions of prior Superintendents of Insurance to deny petitioner a license.

During the trial of the case, when counsel for petitioner offered testimony relative to the question of estoppel, the following colloquy occurred (R. pp. 9, 10):

> "The Court: I think the only thing I will hear is testimony as to whether or not the plaintiff does come within the provisions of this Statute. As to what came on before that, counsel for plaintiff may state what he expects to prove and I will exclude it. The question before me now is whether the plaintiff does come within the provisions of this Statute.
>
> "Mr. Doherty: Your Honor would not permit me to show, by letters and testimony, that Mr. Moor, who was the then Superintendent of Insurance, construed this Statute and told Mr. Stover just what to do at the time he took over the organization?

"The Court: You may tender that proof, but I will exclude it. You may proceed."

The only testimony set forth in the agreed statement of facts (R. pp. 10-19) is that which relates to the question of estoppel.

Respondent respectfully invites attention to the statement made by petitioner on pages 2 and 3 of its brief to the effect that "the condition of the society, insofar as it referred to the initiation of members, medical examinations, death benefits, lodge and ritualistic work, was practically the same in March of 1938, as it was on the 20th day of May, 1940, when the bill of complaint was filed". This statement is misleading. It implies that provisions were made for the initiation of members, for medical examinations and death benefits and lodge and ritualistic work. The agreed statement of fact on this subject (R. p. 10) is to the effect that the status of the society with respect *to the provisions of law* relating to the initiation of members, medical examinations, death benefits, and lodge and ritualistic work, were substantially the same on the two dates mentioned.

There is nothing in the record to support the statement found on page 4 of the petition "that the Superintendent of Insurance had knowledge concerning these outstanding claims ($15,000) against the Society, but which he did not disclose to the witness", nor is there anything in the agreed statement of facts to support the insinuation that the slip of paper in the handwriting of J. Balch Moor, which showed the following breakdown (R. p. 13):

"Reserves	$ 2,500
Claims pending	700
Surplus	510
making a total of	$ 3,510"

was any representation of Moor to Stover. One might equally well conclude from the agreed statement of facts that the

figures noted in Moor's handwriting had been furnished by Stover himself.

The statement found on page 4 of the petition to the effect that J. Balch Moor had written the Commissioner of Insurance at Baltimore, Maryland, to the effect that the petitioner society complied with the fraternal laws of the District of Columbia, is not supported by a reading of that letter (R. pp. 15-17). The letter clearly states that "Mr. Stover has recently contributed considerable money and paid many claims which I considered as unfair, in order to build up to a point where *it can be converted into a mutual insurance company and surplus contributed as required by law to operate as a mutual company in the District of Columbia.* Under the circumstances I trust that you will reconsider your decision and grant this society the privilege of operating in your State until the end of the present license year, June 30th, at which time, if the society has not fully met the requirements of your Code and are converted into a mutual company satisfactory to you, that they will voluntarily withdraw from your state." (Italics supplied.)

There is nothing in the agreed statement of facts to support the allegation in the concluding paragraph of petitioner's statement of the case found on page 4 that "it was not until all the outstanding obligations against the society were actually taken care of, and the society placed on a basis of 'pay as you go', that it was refused a permit to do business in the District of Columbia and threatened with prosecution for doing business without having obtained a permit to do so." This statement that the outstanding obligations of petitioner have been taken care of is negatived by the great emphasis and stress laid by petitioner on its financial obligation to the Stover family in the amount of $39,000.

STATUTES INVOLVED

Section 35-901 of the Code of Laws of the District of Columbia (1940 ed.), Sec. 749, D. C. Code of 1901, as amended Dec. 20, 1928, 45 Stat. 1055, c. 40:

> "A fraternal beneficial association is hereby declared to be a corporation, society, order, or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having *a lodge system with ritualistic form of work and representative form of government,* making provision for the payment of benefits in case of death. * * *" (Italics supplied.)

Section 35-907 of the Code of Laws of the District of Columbia, (1940 ed.), Sec. 755, D. C. Code of 1901:

> *"Any nine or more persons,* at least one-third of whom shall be residents of the District of Columbia being desirous of forming a fraternal beneficial association for the purposes set forth in section 35-901 may associate themselves together and effect such organization as hereinafter prescribed, and not otherwise. Such person shall make, sign, and acknowledge before any officer authorized to take the acknowledgment of deeds in this District and file in the office of the recorder of deeds of said District a certificate of declaration in writing, to be recorded in a book kept for that purpose and open to public inspection, in which shall be stated the name or title by which said association shall be known to law; * * * the name or official title of the officers, trustees, representatives, or other persons by whatever name or title designated, who are to have and exercise the general control and management of its affairs; the place of doing business defined; the limit as to age of applicants for beneficial membership, which shall not exceed fifty-five years, and that medical examinations are required of applicants for life benefits, * * *. The as-

sociation shall elect from its members trustees, directors, or managers, by whatever title known in its laws, at such time and place and in such manner as may be specified in its laws, who shall have the control and management of the affairs and funds of said association, a majority of whom shall be a quorum for the transaction of business; and whenever any vacancy shall happen among such trustees, directors, or managers, by death, resignation, or otherwise, such vacancy shall be filled in such manner as shall be provided by the laws of said association." (Italics supplied.)

Section 35-916 of the Code of Laws of the District of Columbia, (1940 ed.), Sec. 764, D. C. Code of 1901, as amended Dec. 12, 1928, 45 Stat. 1021, c. 24:

"Nothing in this chapter shall be construed to apply to any corporation, * * * or societies that do not have as their principal object the issuance of benefit certificates of membership in case of death or the payment of sick, funeral, or death benefits exceeding in amount $100."

SUMMARY OF ARGUMENT

This case presents no question of general importance.

The question of whether the statute provided for the issuance of perpetual or annual permits was not presented to the United States Court of Appeals for the District of Columbia.

Petitioner society has operated since its present secretary-treasurer and general manager became an officer on March 8, 1938, in clear violation of the express provisions of existing law, in that it has been operated without representative government, for profit, not for the sole benefit of its members, without a lodge or ritualistic form of existence and has sold insurance beneficial memberships to applicants over fifty-five years of age and has not required medical examinations of applicants for life benefits and has not

furnished any real binding provisions for the payment of benefits in case of death. Petitioner contends that, even though such facts admittedly exist, the present Superintendent of Insurance (respondent here) should be estopped to refuse to issue a license to petitioner simply because of the conduct of his predecessor in issuing said license. It is the position of the respondent that such a contention has no basis in law. Estoppel can be raised only when the party claiming it has with legal justification relied on a certain course of conduct. Here the element of justifiable reliance is lacking. Petitioner is presumed to know the law. In this instance there was no opportunity for any discretionary interpretation.

Respondent also invites attention to the fact that petitioner is seeking to control the action of the Superintendent of Insurance by mandatory injunction. Mandatory injunction is essentially the old action of mandamus. Decisions of this Court clearly show that such a writ is controlled by equitable principles. It is not a writ of right but rests in the sound discretion of the Court. It is never issued where the effect of its issuance will be to work a public mischief. Petitioner, in plain terms, is seeking to have this Court perpetuate a clear and unwarranted violation of existing law, to the detriment of the general public and of other insurance companies operating strictly under the terms of the statute.

ARGUMENT

I

This case presents no question of general importance.

This case presents no question of general importance which should be decided by this Court. The decision in the United States Court of Appeals for the District of Columbia is in complete harmony with the decisions of this Court and the decisions in the various United States Circuit Courts of Appeal. Petitioner seeks to invoke a construction of section 754

of the 1901 Code of the District of Columbia in that it contends that under this section it was the duty of the Superintendent to grant a perpetual permit. The trial court found as a matter of law (R. p. 26) as follows:

> "2. The plaintiff corporation, having applied for and received and accepted an annual license, cannot contend that its license is a perpetual or perennial license;"

Petitioner did not present the correctness of this finding to the United States Court of Appeals for the District of Columbia for review and, indeed concedes on page 9 of its brief filed in this Court "that the only matter which was presented to the United States Court of Appeals for the District of Columbia was the exclusion of certain testimony covering acts of prior superintendents of insurance of the District of Columbia."

II

Respondent is not estopped to refuse a permit and the Court of Appeals properly excluded testimony of the acts of prior superintendents of insurance.

It appears from the findings of fact of the trial Court, the correctness of which is not challenged by petitioner, that petitioner is operating its business in clear violation of law. Petitioner makes no contention that it is entitled to write insurance in the District of Columbia unless it is entitled to a license as a fraternal beneficial association. Petitioner further concedes, as it must concede in view of the findings of fact of the trial Court, that its activities do not conform with the requirements of the Fraternal Beneficial Association Statute. Petitioners only contention is that, since prior Superintendents of Insurance have licensed petitioner to do business in viola-

tion of law, respondent must do likewise. Therefore, the only question in this case is whether the present Superintendent of Insurance, because of the actions of his predecessors in office in issuing petitioner licenses in violation of the express terms of the statute, is estopped to deny petitioner a license.

Petitioner misconceives the nature of the doctrine of estoppel. This doctrine can only be invoked by one who has relied upon, and has had a right to rely upon, the action of the person against whom the estoppel is asserted. In the case of *Bloomfield* v. *Charter Oak National Bank*, 121 U. S. 121, 30 L. Ed. 923, this Court, in holding that a town was not estopped to set up the invalidity of a contract entered into by it, said (p. 135):

> "And no estoppel *in pais* can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon."

In this case petitioner knew, or should have known, that it was not complying with the provisions of the statute under which it sought to be licensed and that any license issued to it to operate under these circumstances would be issued in violation of law. The doctrine of estoppel cannot be invoked to make valid that which the law prohibits. As was said by this Court in the case of *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209, 213:

> "The petitioner, who was chargeable with knowledge of the prohibition of the statute, may not invoke an estoppel to impose a liability which the statute forbids. Texas & Pacific Ry. Co. v. Pottorff, 291 U. S. 245, 260; California Bank v. Kennedy, 167 U. S. 362; Concord First National Bank v. Hawkins, 174 U. S. 364, 369; First National Bank v. Converse, 200 U. S. 425, 439; Merchant's National Bank v. Wehrmann, 202 U. S. 295, 302."

Referring to that case, this Court in *Oppenheimer* v. *Harriman*, 301 U. S. 206, 211, said:

> "The purchaser, chargeable with knowledge of the statute, could not invoke estoppel."

Petitioner cites three decisions of this Court: *Essex* v. *New England Telegraph Company*, 239 U. S. 313; *City Railway Company* v. *Citizens Railroad Company*, 166 U. S. 557, and *County of Randolph* v. *Post*, 93 U. S. 502, and implies that these decisions sustain its position to the effect that the Superintendent of Insurance should be estopped to deny a license to the petitioner by reason of the actions of prior Superintendents of Insurance. In those cases the action of the municipal authorities there involved was in conformity with their authority to act. That essential fact is lacking in the instant case.

The United States Court of Appeals for the District of Columbia has uniformly applied the rule that any action of a municipal officer taken in violation of law is a nullity, even though acted upon by the opposite party. In the case of *Berry* v. *District of Columbia*, 32 App. D. C. 96, one Berry requested the Commissioners to permit him to erect a building to a height in excess of that permitted by the building regulations This permission was requested in advance of applying for a building permit, so that plaintiff might make his financial arrangements before deciding upon his building plans. Relying upon the permission granted, Berry paid out sums of money for the drawing of his plans and the procuring of contracts for the erection of the building. He then made application for a building permit, which was denied by the Inspector of Buildings on the ground the height of the proposed building exceeded the height permitted by the regulations. This action of the building inspector was then approved by the Commissioners. Berry brought suit against the District to re-

cover the monies expended. The Court, in denying recovery, said (p. 105):

> "What the commissioners were asked to do in the letters aforesaid was to interpret sec. 40 in advance, so that plaintiff might make his financial arrangements before deciding upon his building plans. As we have seen, the section is too plain to require interpretation. The action taken by the commissioners was a palpable misconstruction, and amounted to nothing more than a virtual suspension of the regulation by way of excepting plaintiff's property from its operation. They are not judicial officers invested with the power to make interpretations of their regulations, upon the petition of parties, but ministerial officers invested with the power to make certain general regulations, and then to enforce them without favor. Their action, being without authority, the plaintiff assumed the risk of incurring expenses on the faith of it."

To the same effect, see also:

Weeks v. *Heurich,* 40 App. D. C. 46, 56;
District of Columbia v. *Wilson,* 44 App. D. C. 265;
Hazard, et al v. *Blessing, et al,* 55 App. D. C. 114, 2 F. (2d) 916.

Petitioner, however, contends that a different rule has been announced by that Court in the later case of *District of Columbia* v. *Cahill,* 60 App. D. C. 342, 54 F. (2d) 453. That case, however, did not involve the issuance of a permit in violation of law, but the issuance of a permit through an error of fact which fact was determined by an officer vested with authority to make such determination. In that case one Cahill wished a certificate of occupancy to use as a garage certain premises in a district zoned residential. Under the zoning regulations such use was prohibited unless the building had been so used since prior to the adoption of the regulations. Cahill contended,

in good faith, that it had been so used. The building inspector, after an investigation of the facts, agreed with Cahill and issued a certificate of occupancy for a non-conforming use. After Cahill, relying upon the issuance of the certificate, had expended large sums of money, the District undertook to revoke the certificate on the ground that the facts were not as found by the building inspector. The Court held that as the building inspector had determined the facts in favor of Cahill, as he had authority to do, the District was estopped from claiming the facts to be otherwise. The grounds of the decision are set forth in the opinion as follows (p. 343):

> "Under section 6 of the Zoning Act of March 1, 1920, supra, *appellee was lawfully entitled to the permit and certificates in question,* if, at the time of the passage of the act, the first floor of the building was in lawful use as a garage, although such use did not conform with the provisions of the act or of the orders and regulations adopted under it. When appellee in good faith presented his application to the inspector of buildings, it became the duty of that officer to ascertain whether the facts justified the granting thereof. See Building Code of the District of Columbia, section II, part 1, A. The inspector made an investigation and decided that the application should be granted; he accordingly issued the permit and certificates in due form to appellee and lessees, and nothing appears in the record to show that this duty was not correctly and honestly performed. * * *." (Italics supplied.)

In this case it is not the duty of any Superintendent of Insurance to authorize the conduct of an insurance business in violation of law. On the contrary it is his duty to refuse a license under such conditions. Furthermore, in the Cahill case the property owner was mislead by the finding of the Building Inspector as to a matter of fact. Here, petitioner could not have been mislead by the action of the prior Superintendent of In-

surance, since petitioner is charged with a knowledge of the law and knew that the business it was conducting did not comply with the requirements of the statute.

The decisions in the United States Circuit Courts and Circuit Courts of Appeals cited by petitioner require no extended discussion, as they are clearly limited to cases where municipalities were held estopped as to matters within the scope of their powers and the powers of their officers. Here, no officer of the District of Columbia had power to issue a permit to an association to operate as a fraternal beneficial association, unless it complied with the statute.

An examination of the State cases on the general principle of estoppel applicable to the facts raised by the issues in the instant case discloses ample authority for the position taken by the Courts below. An early case on the subject, but one still cited with approval as a leading case, (see 21 C. J. 1193, note 26) is that of *Seeger* v. *Mueller, et al.*, 133 Ill. 86, 24 N. E. 513, where the Court said (p. 515):

> "* * * But the rule is different where the plat is made by municipal officers whose powers in the premises are limited and defined by statute. No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers, and therefore cannot be deemed to have been deceived or mislead by acts done without legal authority."

The recent decision of the Maryland Court of Appeals in *Lipsitz* v. *Parr*, 164 A. 743, 164 Md. 222, presents a searching analysis on the general subject of municipal estoppel. In that case the facts were that one Lipsitz obtained a permit from the appropriate city officials of Baltimore to erect a building in which to manufacture ice. The words of the permit unquestionably granted plaintiff a permit to erect an ice manu-

facturing building and carried an endorsement that the use of the land and structure applied for was in conformity with the provisions of zoning regulations approved March 30, 1931. The land, however, was actually in the second commercial use district, in which an ice factory was prohibited. Plaintiff was notified by an official letter, dated January 21, 1932, that the permit was revoked. In the meantime plaintiff had proceeded with the erection of a plant, pursuant to the permit theretofore issued. The Court said (p. 745):

> "A municipality may be estopped by the act of its officers if done within the scope and in the course of their authority or employment, but estoppel does not arise should the act be in violation of law. Paragraph 31 of the ordinance forbade the officials of the municipality to grant the permit which the plaintiff asked and obtained; and paragraph 41 made it a misdemeanor for the plaintiff to use his premises as a factory to make ice as the invalid permit purported to empower.
>
> "* * * A permit thus issued without the official power to grant does not, under any principle of estoppel, prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. In the issuance of permits pursuant to the ordinance at bar, the municipality was not acting in any proprietary capacity nor in the exercise of its contractual powers, but in the discharge of a governmental function through its public officers of limited authority, and the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment. *Every one dealing with the officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.*" (Italics supplied.)

The clear weight of authority is that where the action of the municipality or its officers is ultra vires, the municipality cannot thereafter be estopped to deny its consent. The annotation in 89 A. L. R. 619 (c), includes a number of cases supplementing the annotation in 7 A. L. R. 1249, relating primarily to street franchises. The language there stated is as follows:

> "As stated in the earlier annotation, if the franchise rights claimed are ultra vires the municipality, it cannot be estopped from denying that it consented thereto."

In the case of *Holland Realty and Power Co.* v. *St. Louis* (1920), 282 Mo. 180, 221 S. W. 51, the rule was laid down that when consent to use a city's public ways can be obtained only from its own Legislative Assembly, and in a particular mode (in this case by an ordinance), the administrative officers cannot waive the necessity of procuring consent from the Assembly and in the prescribed mode, and they cannot, by acquiescing in the use of a public way by a utility corporation, estop the municipality from terminating the use.

There is a further annotation in 119 A. L. R. 1512 relating primarily to zoning or fire limit regulations, to the following effect:

> "Most of the cases are to the effect that a municipality is not precluded from enforcing a zoning or fire limit regulation by the fact that one or more of its officers or servants has exceeded his authority by issuing a permit contravening the terms of such regulation; and this notwithstanding that the holder of the permit has proceeded thereunder to his detriment before the municipality seeks to enforce the regulation against him."

In conclusion, it is respectfully submitted that when one claims estoppel it is incumbent upon him to show, as one of the

basic elements, lack of knowledge and of the means of knowledge of the truth as to the facts or requirements in question, 19 Am. Jur. 643. Petitioner was chargeable with knowledge of the requirements of law as to the organization and conduct of a fraternal beneficial association. When it acts as it did in this case in clear contravention of the requirements of law, it cannot thereafter avail itself of the principle of estoppel.

Petitioner relies on two state decisions which, it is respectfully submitted, can be readily distinguished.

In the case of *State ex rel Caldwell* v. *Lincoln St. Ry. et al.*, 80 Neb. 333, 114 N. W. 422, a statute required that a company wishing to construct and operate a street railway in any municipality of the State must file articles of incorporation specifying the termini of such railway and the street or streets through which it is proposed to be constructed and operated, which articles must be approved by the electors of the municipality. A company filed articles of incorporation which had been approved by the electors, which articles named all of the streets of the municipality as the streets upon which the railway was to be constructed and operated. After certain lines of railroad had been constructed, the city, through the county attorney, undertook to question the validity of the franchise on the ground that the statute did not authorize the granting of the right to use all of the city streets. The court agreed with the contention of the city as to the construction of the statute, but held the city was estopped to question the grant as to the lines already established. It will be noted, however, that the city, under the statute, had the power to approve the grant to the extent to which it had been acted upon.

The facts presented by *State ex rel. Washington Paving Company* v. *Clausen,* 90 Washington 450, 156 P. 554, also relied upon by petitioner, establish a situation which furnishes no authority for the proposition on which petitioner depends. In that case the State highway authorities, although they knew of the deviation of one with whom they had entered into

a contract from the specifications of that particular agreement, nevertheless did nothing about it, but on the contrary reaped the benefits of this contractor's labor. Thereafter, on the theory that the contractor had availed himself of a secret price on the material which he had used in the contract, they sought to avoid payment under the contract. We see nothing in this case that establishes any principle that benefits petitioner. The municipal authorities, who had authority to enter into such contract, simply failed to void the contract when they were apprized of the conduct of the contractor. Having availed themselves of the benefits of the contract, the Court ruled that they were liable for payment under the contract. No permit or license was involved in any stage of the proceedings.

III

Relief cannot be granted when opposed to the public interest.

If petioner is granted the relief prayed and is licensed as a fraternal beneficial association, the result will be that it can carry on its business of selling insurance to the public generally without having placed around it the safeguards which Congress has deemed essential for the protection of policy holders. Section 749 of the Code of 1901, as amended December 20, 1928, section 35—901, D. C. Code of 1940, with respect to a fraternal beneficial association, says—"Such association shall be governed by this subchapter, and shall be exempt from the provisions of insurance laws of the United States relating to the District of Columbia, and no law hereafter passed shall apply to them unless they be expressly designated therein:" The statutes relating to fraternal beneficial associations contain no requirement that the associations shall maintain any reserves (unless they write insurance or annuities upon the lives of children, Act of May 29, 1928, 45 Stat. 953, secs. 35—918 to 35—921, D. C. Code of 1940). The Superintendent of Insur-

ance has no control over these associations after a license has been issued except to require, under the provisions of section 762 of the Code of 1901, sec. 35—914, D. C. Code of 1940, the filing of an annual report. Even though the report discloses the association is in a serious financial condition the superintendent can take no action. At the time this suit was filed a company engaging in a business such as petitioner is engaged in would be required to comply with the provisions of the Marine Insurance Act of March 4, 1922, 42 Stat. 401, secs. 35—1100 to 35—1132, D. C. Code of 1940. Under sections 3 and 4 of this Act the company is required to have a certain capital or surplus, and reserves. Section 18 of the Act limits the types of securities in which the company may invest its capital and surplus. Under section 654 of the D. C. Code of 1901, as amended September, 1916, section 35—1201, D. C. Code of 1940, the representatives of insurance companies must be licensed. Under section 647, as amended, of the D. C. Code of 1901, section 35—103, D. C. Code of 1940, every insurance company is required to publish an annual statement of its true financial condition in a daily newspaper in the District of Columbia.

Subsequent to the institution of this suit Congress, on October 9, 1940, passed the Fire and Casualty Act of the District of Columbia, 54 Stat. 1063, sections 35—1301 to 35—1350, D. C. Code of 1940 which set up a comprehensive code for the control and regulation of the business of insurance in the District of Columbia. Licensed fraternal beneficial associations were exempt from all of these requirements of law because Congress evidently felt that such organizations were not engaged in competition with commercial companies; that their insurance activities would be subordinate to their fraternal activities, and that the policy-holders' real protection lay in the bond of fellowship between the individual members, in the required representative form of government, and in the prohibition of operations for profit. In this case petitioner is a fra-

ternal beneficial association in name only. In fact, it is engaged in a commercial business in open competition with companies duly licensed as such and subject to the requirements of law pertaining to them. To permit petitioner to carry on its business free of the safeguards which Congress deems essential to the protection of policy-holders would work a public mischief.

It is well settled that the rules governing the issuance of writs of mandamus and mandatory injunctions are the same.

United States v. *Mellon*, 59 App. D. C. 24, 32 F. (2d) 415, certiorari denied 280 U. S. 561;
Moore v. *Heany*, 34 App. D. C. 31;
McKenzie v. *Fisher*, 40 App. D. C. 74;
U. S. ex rel Riverside Oil Co. v. *Hitchcock*, 190 U. S. 316.

It is equally well settled that neither a writ of mandamus nor a mandatory injunction will issue if it will work a public injury or embarrassment or be prejudicial to the public interest.

In the case of *Greathouse* v. *Dern*, 289 U. S. 353, this Court said:

> *"The court, in its discretion, may refuse mandamus to* compel the doing of an idle act, *Turner* v. *Fisher, supra,* 209; *Wilson* v. *Blake,* 169 *Cal.* 449; 147 Pac. 129; or *to give a remedy which would work a public injury or embarrassment, (see Duncan Townsite Co.* v. *Lane, supra; Arant* v. *Lane, supra; Effingham, Maynard & Co.* v. *Hamilton,* 68 Miss. 523; 10 So. 39; cf. *Matter of Lindgren, supra,* 66; *McCarthy* v. *Street Comm'rs, supra) just as in its sound discretion a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.* See *Seaboard Air Line Ry. Co.* v. *Atlanta B. & C. R. Co.,* 35 F (2d) 609; *Conger* v. *New York, W. S. & B. R. Co.,* 120 N. Y. 29; 23 N. E. 983; *Clarke* v. *Rochester, L. & N. F. R. Co.,* 18 Barb. 350; *Whalen* v. *Baltimore & Ohio R. Co.,* 108 Md. 11; 69 Atl. 390; *Curran* v. *Holyoke Water Power Co.,* 116 Mass. 90;

Southern Ry. Co. v. *Franklin & P. R. Co.*, 96 Va. 693; 32 S. E. 485, cf. *Willard* v. *Tayloe*, 8 Wall. 557." (Italics supplied.)

See also:

Duncan Townsite Company v. *Lane*, 245 U. S. 308, 311;
Payne v. *United States*, 50 App. D. C. 219, 269 F. 871;
Morgan v. *Howard*, 54 App. D. C. 3, 293 F 650;
Seaboard Air Line Railway Company v. *Atlanta, B. & C. R. Co.*, 35 F. (2d) 609, (C.C.A. 5th Cir.)

CONCLUSION

We respectfully submit, in consideration of the findings of the trial justice, in consideration of our discussion of the principles of estoppel, and mandamus, and in view of the terms of Acts of Congress relating to fraternal beneficial associations and other insurance companies doing business in the District of Columbia, that the decision below is correct and the petition for writ of certiorari should be denied.

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